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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DORISTEEN LESLIE, individually and
on behalf of all others similarly situated,

10 Plaintiff,

11 v.

12 FIDELITY NATIONAL TITLE
INSURANCE COMPANY,

13 Defendant.
14

CASE NO. C08-5252BHS

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
RECONSIDERATION AND
DENYING DEFENDANT'S
MOTION FOR
RECONSIDERATION

15 This matter comes before the Court on the parties' motions for reconsideration.
16 Dkts. 48 and 50. The Court grants in part and denies in part Plaintiff's motion for
17 reconsideration, and denies Defendant's motion for reconsideration for the reasons stated
18 herein.

19 **I. BACKGROUND**

20 On November 21, 2008, the Court issued an order ("Order") granting in part and
21 denying in part Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dkt.
22 47. The Court dismissed Plaintiff's Consumer Protection Act ("CPA") per-se claims
23 based on alleged violations of RCW 48.29.140 and WAC 284-30-800, as well as her
24 common law claims for money-had-and-received, unjust enrichment, and breach of
25 implied contract. *Id.* at 17. The Court allowed Plaintiff's CPA claim for violation of the
26 duty of good faith ("bad faith claim"), pursuant to RCW 48.01.30, to proceed. *Id.* The
27 Court did not squarely address the issue of whether Plaintiff's claim for non-per-se
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1 violation of the CPA survived Defendant's motion to dismiss. *See* Dkt. 36, 14-17
2 (Plaintiff's response to Defendant's motion for summary judgment) (alleging non-per-se
3 violation of the CPA).

4 On December 8, 2008, Plaintiff filed a motion for reconsideration. Dkt. 48.
5 Plaintiff moves the Court to reconsider the dismissal of her CPA claim based on a per-se
6 violation of RCW 48.29.140 as well as the dismissal of her common law claims. Plaintiff
7 maintains that the Court erred by concluding that RCW 48.29.140 does not prohibit a title
8 insurer from deviating from filed rates. Plaintiff alternatively requests the Court to certify
9 the issue of whether a title insurer may deviate from its filed rates for review pursuant to
10 28 U.S.C. § 1292(b). *Id.* at 9.

11 On December 8, 2008, Defendant filed a motion to amend the Order, which the
12 Court deemed a motion for reconsideration. Dkt. 50. Defendant moves the Court to
13 amend the Order to dismiss Plaintiff's bad faith claim. Defendant maintains that
14 Plaintiff's bad faith claim fails because, in Washington, only an insured may bring such a
15 claim.

16 On January 7, 2009, the Court requested additional briefing from the parties
17 regarding the motions for reconsideration. Dkt. 51. In addition to the issues raised in the
18 motions for reconsideration, the Court requested briefing from the parties as to whether
19 Plaintiff's non-per se CPA claim should proceed, as well as whether any issues should be
20 certified to the Washington Supreme Court.

21 On December 31, 2008, the Washington State Insurance Commissioner filed an
22 amicus brief. Dkt. 55, *see also* Dkt. 65 (granting leave to file amicus brief). The Insurance
23 Commissioner maintains that the insurance code prohibits a title insurer from deviating
24 from filed rates.

25 II. DISCUSSION

26 Motions for reconsideration are governed by Local Rule CR 7(h), which provides
27 as follows:
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1 Motions for reconsideration are disfavored. The court will ordinarily deny
2 such motions in the absence of a showing of manifest error in the prior
3 ruling or a showing of new facts or legal authority which could not have
4 been brought to its attention earlier with reasonable diligence.

5 Local Rule CR 7(h)(1).

6 Plaintiff and the Insurance Commissioner contend that the Court erred in
7 concluding that the insurance code does not require a title insurer to charge only its filed
8 rates. In addressing Plaintiff's bad faith claim, the Court recognized that current law does
9 not *permit* a title insurer to deviate from its filed rates:

10 [W]hile a mere deviation from filed rates does not constitute a per
11 se violation of the CPA, Plaintiff here has alleged that Fidelity's deviation
12 from its filed rate was conducted in bad faith. A reading of RCW
13 49.29.140 indicates that the Legislature clearly intended the Insurance
14 Commissioner to review title insurance rates to insure that the rates are
15 reasonable. The statute governing title insurers, like the statute governing
16 general insurers, provides that "[p]remium rates for the insuring or
17 guaranteeing of titles shall not be excessive, inadequate, or unfairly
18 discriminatory." RCW 49.29.140(1). Title insurers are required to file their
19 premium rates, as well as any modifications to these rates. RCW
20 49.29.140(2). After rates have been filed, the Insurance Commissioner may
21 order the modification of any premium rate found by the commissioner to
22 be excessive, inadequate, or unfairly discriminatory after a hearing. RCW
23 49.29.140(3). While title insurers are not explicitly prohibited from
24 deviating from filed rates, the Legislature must have intended title insurers
25 to file their rates in good faith. Otherwise, a title insurer could intentionally
26 file a false rate with the Insurance Commissioner in order to avoid the
27 oversight that was intended to protect consumers from excessive rates.
28 Therefore, **while Fidelity correctly argues that current law does not
explicitly prohibit a title insurer from deviating from its filed rates, the
Court concludes that current law also does not permit title insurers to
file a false rate**, as alleged here, and subsequently charge consumers 20 to
50% more than the filed rate, if a fact-finder determines that these actions
were taken in bad faith.

Dkt. 47, 13-14 (emphasis added).¹

¹ This analysis also rejects Fidelity's argument that the filing of rates is merely
"informational" for the public's use and that the insurance code does not contemplate any
policing of deviations from filed rates. As the Insurance Commissioner argues: "if insurers are
not charging the rates that they have filed with the [Insurance Commissioner], the *inaccurate*
filings cannot provide 'accurate, unbiased' information to consumers." Dkt. 67 at 3 (emphasis in
original). Fidelity's argument that it was "permitted to use rates unless and until they were
deemed to be unfair, discriminatory or excessive" is also unavailing. The title insurance code
authorizes the Insurance Commissioner to modify excessive, inadequate, or unfairly

1 However, while the Order stated that the insurance code does not explicitly permit
2 a title insurer to deviate from its filed rates, the Court erred in concluding that the title
3 insurance code does not prohibit a title insurer from deviating from filed rates. *See id.* at
4 12. Upon reconsideration, the Court concludes that while the title insurance code does not
5 contain language affirmatively prohibiting a title insurer from deviating from its filed
6 rates, the code does prohibit a title insurer from deviating from filed rates.²

7 The statutory scheme of the insurance code supports this conclusion. First, as
8 Plaintiff argued in her response to Fidelity’s motion to dismiss, the insurance code
9 requires a title insurer to file rates “to be charged by it.” RCW 48.29.140(2). Thus, despite
10 the difference in language used in the general insurance chapter, RCW 48.19, a title
11 insurer who deviates from filed rates is not in compliance with the statute. Second, and
12 perhaps more importantly, the title insurance code requires a title insurer to file
13 modifications of any rates, and modified rates are not effective until fifteen days after
14 filing. *Id.* The Court agrees with the Insurance Commissioner’s interpretation of both
15 provisions: “[i]t is clear from the plain language of the statute that the rates initially to be
16 used by the insurer must be filed, and that any addition or modification to those rates must
17 also be filed or they can never be effective.” Dkt. 55 at 7; *see also* Dkt. 69 at 7 (Plaintiff’s
18 reply brief). In other words, a title insurer may not deviate from its filed rates until fifteen
19 days after filing a modified rate, because such a rate would not be effective under the title
20 insurance code. The Court erred in previously rejecting this argument.

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22 discriminatory rates *based on filed rates*. *See* RCW 48.29.140(3). Quite plainly, the Insurance
23 Commissioner’s ability to evaluate a rate to determine whether it is unfair, discriminatory, or
24 excessive, would be hindered if title insurers were permitted to file inaccurate rate schedules.
25 The Court also notes that while Plaintiff has not shown that judicial estoppel applies to Fidelity’s
26 argument in a separate case that RCW 48.29.140 *does* require a title insurer to charge only its
27 filed rates, Fidelity’s prior arguments are nonetheless illustrative of why its current arguments
28 are implausible.

² To hold that a statute does not “affirmatively prohibit” an act, but does “prohibit” an act
may seem superfluous, but here it is pertinent to the issue of whether Plaintiff has pled a
cognizable per se claim under the CPA. *See* Section II(A), *infra*.

1 **A. Plaintiff’s Per Se CPA Claim (based on violation of RCW 48.29.140)**

2 The Court set out the legal standards for CPA claims in the Order. *See* Dkt. 17, 7-
3 9.

4 The Court did not err in dismissing Plaintiff’s per se CPA claim based on an
5 alleged violation of RCW 48.29.140. While RCW 48.29.140 requires a title insurer to
6 follow its filed rates, Plaintiff has not directed the Court to any language in RCW
7 48.29.140, or any other statute or regulation, that provides that a violation of RCW
8 48.29.140 gives rise to a per se CPA violation claim. *See* Dkt. 47 at 8 (per se unfair trade
9 practice exists when statute declares an act to constitute an unfair or deceptive practice)
10 (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,
11 786 (1986)). As argued in Fidelity’s initial motion to dismiss, Washington law does not
12 identify a deviation from filed rates as an unfair or deceptive practice. *Id.* at 9 (citing
13 Fidelity’s motion to dismiss).

14 While the insurance code states that the business of insurance is “one affected by
15 the public interest,” RCW 48.01.030, the Order properly concluded that the fact that a
16 title insurer deviates from filed rates does not give rise to a per se claim under the CPA
17 unless a plaintiff can establish that the insurer acted in bad faith. The Court based this
18 conclusion on the fact that the title insurance code does not currently contain language
19 that affirmatively prohibits such deviations similar to the provision found in the general
20 insurance chapter. *Compare* RCW 48.29.140 *with* RCW 48.19.040(6). At a minimum,
21 had the Legislature intended a deviation from filed rates to constitute a per se violation of
22 the CPA, it would have included affirmative language prohibiting the deviation from filed
23 rates. Indeed, newly enacted title insurance legislation does include such language,
24 effective no earlier than 2010. RCW 48.29.140.

25 **B. Plaintiff’s Per Se CPA Claim (based on RCW 48.01.030)**

26 Fidelity maintains that Plaintiff’s bad faith claim fails because only an insured may
27 bring such a claim. Fidelity cites several cases in support of this argument. *See* Dkt. 50, 3-
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1 5 (collecting cases). Plaintiff distinguishes the cases cited by Fidelity, arguing that none
2 of the cases involve a bad faith claim brought by a purchaser of a title insurance policy.
3 Rather, Plaintiff argues, “the cases generally involve claims of bad faith in refusing to pay
4 an insured’s first-party claim or the handling of a third-party liability claim.” In its reply,
5 Fidelity argues that the Washington Supreme Court held that a purchaser of a title
6 insurance policy could not bring a bad faith claim under the CPA. Dkt. 71 (citing
7 *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409 (1985)).

8 In *Transamerica*, the Washington Supreme Court rejected a title insurance
9 purchaser’s bad faith CPA claim because “a cause of action for a per se violation of the
10 CPA may be brought only by the insured,” and the purchaser was not the insured under
11 the policy. *Transamerica*, 103 Wn.2d at 418. The purchaser claimed that the title
12 insurance company owed him a duty to search and disclose assessments on the property.
13 The *Transamerica* court held that the title insurance company did not owe the purchaser a
14 duty to search and disclose assessments on the property, finding that the plaintiff had not
15 relied on the company to do so. *Id.* at 415.

16 More recently, the Washington State Supreme Court cited *Transamerica* when it
17 stated “only an insured may bring a per se action” under the CPA. *Tank v. State Farm*
18 *Fire & Ins. Cas. Co.*, 105 Wn.2d 381, 394 (1986).³ However, the *Tank* court
19 acknowledged an exception to this rule. The *Tank* court distinguished a state court of
20 appeals decision which held that a widow, who was not the insured under a life insurance
21 policy, could bring a CPA action against the insurer. *Id.* (citing *Gould v. Mutual Life Ins.*
22 *Co.*, 37 Wn. App. 756 (1984)).⁴ In contrast to the third-party claimant plaintiffs in *Tank*,

25 ³ *Tank* involved the issue of whether a third party-claimant who was injured by the
26 insured may bring a cause of action against the insurer.

27 ⁴ Some courts have held that *Gould* has been reversed on other grounds. *See, e.g.,*
28 *Manteufel v. Safeco Ins. Co. of America*, 116 Wn. App. 1047 (2003).

1 the state Supreme Court recognized that the plaintiff in *Gould* was owed a direct
2 contractual obligation as a beneficiary under the insurance contract. *Id.*

3 Thus, under some circumstances, a plaintiff who is not the insured may bring a bad
4 faith CPA claim against an insurer. In this case, Plaintiff has alleged that she is owed a
5 contractual obligation because she purchased the title insurance policy when she
6 refinanced her loan. Plaintiff alleges that Fidelity acted in bad faith by not providing her
7 with the rate Fidelity represented in its filings. This raises a different issue than the issue
8 raised in *Transamerica*, where the plaintiff maintained that the title insurer owed the
9 purchaser of the policy a duty to search and disclose assessments on the property after the
10 plaintiff purchased the policy.

11 This action is only at the pleading stage, and further development of the record
12 may be required to determine whether Plaintiff and Fidelity share a contractual
13 relationship, and whether such a relationship is of the type that may provide Plaintiff
14 standing to bring a bad faith CPA claim. Accordingly, the Court concludes that it did not
15 commit manifest error in allowing this claim to survive a Fed. R. Civ. P. 12(b)(6) motion
16 to dismiss.

17 **C. Plaintiff's non-Per Se CPA Claim**

18 The Order did not address Plaintiff's non-per se CPA claim. The Court concludes
19 that Plaintiff has pled a cognizable claim for a non-per se CPA claim based on Fidelity's
20 alleged misrepresentation of its rates. Fidelity's contention that Plaintiff was not deceived
21 because Fidelity disclosed the price to her prior to her refinance raises a factual issue that
22 is not determinative of the issue of whether Plaintiff has pled a cognizable claim. In
23 addition, Fidelity's contention that Plaintiff fails to state a claim because she failed to
24 allege reliance is unavailing. Plaintiff satisfied notice-pleading standards; in any event,
25 even if reliance were an element of a CPA claim, Fidelity's motion to dismiss challenged
26 only the issue of whether the allegations rise to the level of "unfair or deceptive act or
27 practice." Dkt. 22 at 12 (Fidelity's motion to dismiss); *see also Indoor*

1 *Billboard/Washington v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 83 (2007)
2 (proximate cause in a CPA claim is a factual question). Plaintiff also correctly
3 characterizes Fidelity's other arguments as raising factual issues, including its claim that
4 it performed in good faith and that it did not act in a manner that had a capacity to
5 deceive. With regard to Fidelity's contention that its actions fall within the safe-harbor
6 provision of the CPA, RCW 19.86.170, the Court has concluded that title insurers are not
7 "permitted" to deviate from filed rates. *See also* Dkt. 47 at 10.

8 **D. Plaintiff's Common Law Claims**

9 The Court previously dismissed Plaintiff's common law claims for unjust
10 enrichment, money-had-and-received, and breach of implied contract. The Court based
11 these dismissals on *Pain Diagnostics and Rehab. Associates, P.S. v. Brockmon*, 97 Wn.
12 App. 691 (1999), where the Washington Court of Appeals (Division II) held that private
13 causes of action for violations of the insurance statutes and regulations must be brought
14 under the CPA. Dkt. 47, 15-16. The Court reasoned that dismissal was warranted because
15 Plaintiff's common law claims were all based on an alleged violation of RCW 48.29.140.

16 Plaintiff contends that dismissal of these claims was improper based in part on a
17 recent Washington Supreme Court holding in *Potter v. Wash. State Patrol*, 2008 Wash.
18 Lexis 1059 (Nov. 26, 2008). In *Potter*, the court held that a common law cause of action
19 is not abrogated by a statutory cause of action unless there is an "explicit statement or
20 clear evidence of the legislature's intent to abrogate the common law." Plaintiff argues
21 that her common law claims should proceed because "there is no indication that the
22 legislature intended the CPA to supplant all common-law causes of action in the
23 insurance context." Dkt. 54 at 10. Fidelity maintains that Plaintiff fails to state proper
24 common law claims not because the claims are abrogated by the CPA, but rather because
25 the CPA or the insurance statutes "form the basis" for her common law claims. Dkt. 71 at
26 6. Fidelity contends that this Court correctly concluded that Plaintiff's claims must be
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1 brought under the CPA because the claims are based on an alleged violation of the title
2 insurance code. *Id.* (citing Order at 16).

3 To prevail on a claim for unjust enrichment, a plaintiff must establish that (1) a
4 benefit was conferred on another party, (2) with that party's knowledge, and (3) the
5 retaining of the benefit by the party is inequitable. *Dragt v. Dragt/DeTray LLC*, 139 Wn.
6 App. 560, 576 (2007). To prevail on a claim for money-had-and-received, a plaintiff
7 "must show that the money was received in such circumstances that the possessor will
8 give offense to equity and good conscience if permitted to retain it." *Ehsani v.*
9 *McCulough Family P'ship*, 160 Wn.2d 586, 592 (2007).

10 To prevail on a breach of implied contract claim, a plaintiff must demonstrate that
11 implied contract exists based on the acts of the parties involved and in light of the
12 surrounding circumstances. *Caughlan v. Int'l Longshoreman's and Warehouseman's*
13 *Union*, 52 Wn.2d 656, 660 (1958). An implied contract requires mutual assent of the
14 parties, but a trial court may "deduce mutual assent from the circumstances, whereby the
15 court infers a contract based on a course of dealings between the parties or a common
16 understanding within a particular commercial setting." *Hoglund v. Meeks*, 139 Wn.App.
17 854, 870-71 (2007). "Whether parties manifested mutual assent to form a contract is
18 generally a factual question." *Id.*

19 The Court concludes that Plaintiff's common law claims should proceed. Her
20 unjust enrichment and money-had-and-received claims may be based on Fidelity's
21 alleged violation of RCW 48.29.140, but the claims are independent of Plaintiff's CPA
22 claims. In any event, Fidelity has not directed the Court to any language in the CPA or the
23 insurance code that indicates that the Legislature intended the CPA to supplant common
24 law causes of action. This order recognizes that a title insurer does violate RCW
25 48.29.140 when it deviates from its filed rates. Thus, Plaintiff has stated cognizable
26 common law claims for
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1 unjust enrichment and money-had-and-received by alleging that Fidelity improperly
2 received a benefit to which it was not entitled.⁵

3 The Court also concludes that Plaintiff's breach of implied contract claim should
4 proceed. In its motion to dismiss, Fidelity argued that this claim fails because (1) the
5 claim is barred by RCW 48.18.190 which prohibits modification of an insurance policy
6 except by writing, (2) Plaintiff failed to plead any meeting of the minds or mutual assent,
7 and (3) there could be no breach of implied contract because the rate charged was not
8 unlawful. Dkt. 22 at 20. The Court here addresses only the first two arguments because
9 this order recognizes that Plaintiff validly alleges a violation of RCW 48.29.140.

10 Fidelity frames Plaintiff's allegation in support of her breach of implied contract
11 claim as follows: An implied contract between Plaintiff and Fidelity should have
12 modified the agreed price, which was contained in the actual written title insurance
13 contract between Fidelity and Wells Fargo. Fidelity claims that such a claim is barred
14 because an unwritten contract to vary the express terms of a title policy would violate
15 Washington's codified parol evidence rule with respect to insurance policies. *Id.* (citing
16 RCW 48.19.190). In her response, Plaintiff maintains that the implied contract between
17 Fidelity and Plaintiff, whereby Fidelity agrees to charge a lawful rate, is separate from the
18 written contract between Fidelity and Wells Fargo, and thus "Fidelity's appeal to the
19 parol evidence rule . . . is to no avail." Dkt. 36 at 23. The Court agrees with Plaintiff.
20 Plaintiff does not claim that she and Fidelity agreed to modify terms of the contract.
21 Rather, Plaintiff claims that the contract price was unlawful.

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23 ⁵ In its motion to dismiss, Fidelity argued that Plaintiff's common law claims fail because
24 "enforcement authority [under the insurance code] is expressly delegated only to the insurance
25 commissioner" and "[n]owhere does the statute provide for any other remedy, including a private
26 cause of action." Dkt. 22 at 19. While the authority to enforce some provisions of the insurance
27 code and regulations may lie solely with the Insurance Commissioner, here Plaintiff has alleged
28 that she was directly harmed as a result of Fidelity's deviation from its filed rates. In this
situation, the Commissioner apparently does not have authority to order a title insurer to pay
restitution or damages to a consumer. Thus, a consumer's remedy in Plaintiff's situation is to file
a private action. *See* Dkt. 55 at 3 (Insurance Commissioner's amicus brief).

1 Fidelity next maintains that Plaintiff failed to allege a meeting of the minds or
2 mutual assent between Plaintiff and Fidelity. This argument fails. Plaintiff's breach of
3 implied contract claim satisfies notice-pleading standards. Whether an implied contract
4 actually exists is a factual question.

5 **E. Certification to Washington State Supreme Court or for Interlocutory Appeal**

6 In her motion for reconsideration, Plaintiff alternatively requested the Court to
7 certify for interlocutory appeal the question of whether title insurers are required to
8 follow filed rates. This request is moot.

9 The Court also concludes that certification to the Washington Supreme Court is
10 not necessary.

11 **III. ORDER**

12 IT IS HEREBY ORDERED that


13 Defendant's motion for reconsideration (Dkt. 50) of the Court's denial of
14 Defendant's motion to dismiss Plaintiff's bad faith CPA claim is **DENIED**.

15 IT IS FURTHER ORDERED that

16 Plaintiff's motion for reconsideration (Dkt. 48) is **GRANTED in part** and
17 **DENIED in part**, as follows:

- 18 1. Plaintiff's non-per se Consumer Protection Act claim may proceed.
- 19 2. Plaintiff's common law claims for unjust enrichment, money-had-and-
20 received, and breach of implied contract may proceed.
- 21 3. Plaintiff's motion for reconsideration of the Court's dismissal of her per se
22 Consumer Protection Act claim based on a violation of RCW 48.29.140 is denied.
- 23 4. Plaintiff's alternative motion to certify for interlocutory appeal is denied as
24 moot.

25 Dated this 26th day of February, 2009.

26 
27 BENJAMIN H. SETTLE
28 United States District Judge